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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO JOSEPH CASTELLANOS, Defendant and Appellant.	E054163 (Super.Ct.No. RIF135323) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Ernesto Joseph Castellanos guilty of 30 counts of committing a lewd or lascivious act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)[1] The jury found true the allegation that defendant committed lewd or lascivious acts against more than one victim. (Former § 667.61, subd. (e)(5), eff. Sept. 28, 1998.) In a prior opinion, this court vacated defendant's original sentence and directed the trial court to resentence defendant. (*People v. Castellanos* (Jan. 25, 2011, E048609) [nonpub. opn.].) At the resentencing hearing, the trial court sentenced defendant to prison for an indeterminate term of 45 years to life. Defendant contends the trial court erred by sentencing him pursuant to the "One Strike" law. (§ 667.61, subd. (b).) We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PRIOR OPINION[2]

The victims of defendant's crimes were his three granddaughters. Defendant molested the victims separately. When molesting the victims, defendant would place his penis on the victims' genitals, touch their buttocks, and/or kiss the victims' mouths. Counts 1 through 10 concerned Victim-1, counts 11 through 20 related to Victim-2, and counts 21 through 30 concerned Victim-3. The molestations occurred at defendant's home, from 2003 through February 1, 2007. During a taped interview, defendant

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

[2] The facts in this section are taken from our prior opinion. (*People v. Castellanos* (Jan. 25, 2011, E048609) [nonpub. opn.].)

explained his penis occasionally fell through the flap of his pajamas, and that his penis may have been exposed to Victim-1 and Victim-2.

Originally, the trial court sentenced defendant to prison for a determinate term of 64 years for the substantive offenses (§ 288, subd. (a)), and a consecutive indeterminate term of 15 years to life for committing the offenses against multiple victims (former § 667.61, subds. (b), (e)(5)). In the first appeal, defendant contended the trial court violated the ex post facto clauses of the state and federal Constitutions when imposing defendant's sentence, because the court applied the post-January 1, 2006, sentencing laws, in which defendant was not eligible for probation. (Cal. Const., art. I, § 9; U.S. Const., art. I, § 10, cl. 1.) The People supported defendant's argument. We agreed with the parties, and directed the trial court to explain, on the record, its reasons for granting or denying probation.

Also in the first appeal, defendant contended the trial court erred by sentencing him, in count 30, to two years in prison (§ 288, subd. (a)), *and* 15 years to life (former § 667.61, subd. (b)), because former section 667.61, subdivision (b) provided an alternate sentencing scheme, not a sentence enhancement. The People supported defendant's argument. We agreed with the parties, and concluded that only the indeterminate term should have been imposed. The People further argued the trial court erred by imposing a six-year prison term in count 1 and two-year prison terms in counts 2 through 30 (§ 288, subd. (a)), because 15-year-to-life sentences should have been imposed on all 30 counts. We agreed with the People.

B. RESENTENCING HEARING

The trial court held a resentencing hearing on July 22, 2011. At the hearing, the trial court stated it considered the original probation report, the amended probation report, defendant's sentencing memoranda, defendant's supplemental sentencing memoranda, cases provided by the defense, the appellate record related to sentencing, a probation officer's statement dated June 16, 2011,[3] the prosecution's sentencing memoranda, and a psychological report by Dr. Michael Kania.

Defendant's wife spoke at the resentencing hearing. Defendant's wife said she was sick, wanted defendant home, and would help him comply with the terms of his probation. Defendant's daughter (the victims' mother) also spoke at the hearing. Defendant's daughter said defendant "made a stupid mistake," and asked the court to grant defendant probation so the family could "get this all together and close it." Defendant's trial attorney argued the family would help protect the victims if defendant were granted probation.

The trial court found granting defendant probation would not be in the best interests of the three victims. The court remarked that a probation report reflected the victims have ongoing psychological problems as a result of defendant's crimes. The trial court also considered whether it was feasible to rehabilitate defendant, whether defendant was amenable to treatment, and whether being placed in a recognized treatment program for child molestation would assist defendant. The court found

[3] It appears from the appellate record that the amended probation report and the probation officer's statement may be the same document.

rehabilitation was not feasible. The trial court explained, "To this day, to this absolute day, the defendant denies any responsibility for what happened whatsoever. He denies it repeatedly." The court went through defendant's various statements denying culpability and concluded defendant lacked remorse for his crimes.

Further, the trial court considered whether returning defendant to the family would be in the best interests of the victims. The trial court found it would not be in the victims' best interests because the victims would likely have a negative response to continually being in defendant's presence.

The trial court said, "[W]hile he is potentially able to be placed on probation, that it is not something the Court would order in this instance for the reasons mentioned." The trial court ordered consecutive terms of 15 years to life for count Nos. 1, 11, and 21. The trial court ordered concurrent terms of 15 years to life for the remaining counts. The factors in aggravation were (1) taking advantage of a position of trust, and (2) using a high-degree of planning and sophistication to avoid discovery. Factors in mitigation were defendant's lack of criminal history, and his age.

In closing, the trial court said, "The jury made a determination, and everything was found to not only have happened, but to have been true. And so in order to protect those young girls, as best as can be accomplished by keeping their grandfather away from their life, the Court saw no other alternative. I just absolutely, unequivocally did not think probation would be appropriate in this instance."

DISCUSSION

Defendant highlights the following remark by the trial court: "[W]hile he is potentially able to be placed on probation, that it is not something that the Court would order in this instance for the reasons mentioned." Defendant argues, "If [defendant] was 'potentially able' to be placed on probation, then he was *qualified* (eligible) for probation." Defendant asserts the trial court's various findings, such as the best interests finding, were incorrect. Defendant contends that since he was eligible for probation, he should not have been sentenced pursuant to the "One Strike" law; rather, he should have been sentenced pursuant to the general sentencing scheme for violating section 288, subdivision (a).

In other words, defendant appears to be asserting the trial court had three sentencing options, as opposed to two. The trial court believed its options were between (1) probation, and (2) 15 years to life in prison. However, defendant believes there was a third option, which was applying the general sentencing scheme. We disagree.

For crimes committed prior to January 1, 2006, former section 667.61, subdivision (b), provided, "[A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)." (Former § 667.61, subd. (b).) Former section 667.61, subdivision (c)(7), included "[a] violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of

Section 1203.066."[4] The subdivision (e) finding in this case related to multiple victims. (Former § 667.61, subd. (e)(5).)

Thus, defendant's argument in this case hinges on the word "qualifies." Defendant is asserting "qualifies" means eligible, such that if a defendant is eligible for probation, even though the trial court may choose not to grant probation, the defendant cannot be sentenced pursuant to the One Strike law. "'In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law[.]'" (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

A reading of the plain language of the statute is that it creates two options: (1) probation, or (2) a prison term of 15 years to life. The plain language does not reflect that a defendant may be sentenced pursuant to the general sentencing scheme if he were eligible for probation but denied probation by the trial court, because the plain language of the statute does not mention the general sentencing scheme. The plain language is simply that a defendant "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years" unless "the defendant qualifies for probation under subdivision (c) of Section 1203.066." There is

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[4] Prior to January 1, 2006, defendant could have qualified for probation if he satisfied the following criteria: (1) the defendant was the victims' relative; (2) probation was in the best interests of the children; (3) rehabilitation of the defendant was feasible, the defendant was amendable to treatment, and the defendant was placed in a recognized treatment program designed to address child molestation; (4) the defendant was removed from the victims' household until the trial court determined that it was in the best interests of the victims to return the defendant to the household; and (5) there was no threat of physical harm to the children if probation was granted. (Former section 1203.066, subds. (a)(7), (c), eff. Dec. 31, 2005.)

nothing reflecting that the Legislature was creating a third sentencing option. The words only reflect the two options of probation or an indeterminate prison term. Since the general sentencing scheme is not mentioned in the pertinent provision, we conclude the plain language of the statute does not support application of the general sentencing scheme.

Further, we reject defendant's premise that he satisfied the requirements for probation. We review the trial court's conclusions for an abuse of discretion. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) As set forth *ante*, prior to January 1, 2006, defendant could have qualified for probation if he satisfied the following criteria: (1) the defendant was the victims' relative; (2) probation was in the children's best interests; (3) rehabilitation of the defendant was feasible, the defendant was amendable to treatment, and the defendant was placed in a recognized treatment program designed to address child molestation; (4) the defendant was removed from the victims' household until the trial court determined that it was in the best interests of the victims to return the defendant to the household; and (5) there was no threat of physical harm to the children if probation was granted. (Former § 1203.066, subds. (a)(7), (c).)

A probation officer's statement dated June 16, 2011, reflects "defendant denied all culpability in this matter" and claimed the victims "had been 'coached.'" The probation officer concluded defendant was a threat to society, in part due to the multiple molestations occurring over several years. Dr. Kania's psychological report, dated June 23, 2011, concluded (1) probation would be in the victims' best interests, based upon the victims' parents' statements, but (2) defendant is only "marginally amenable to

treatment, given that even after his conviction he minimizes the extent of the molestation."

Given the foregoing evidence, the trial court could reasonably conclude defendant did not satisfy the third factor, which requires (1) rehabilitation of the defendant to be feasible, (2) the defendant being amendable to treatment, and (3) the defendant being placed in a recognized treatment program designed to address child molestation. The evidence reflects defendant did not take responsibility for his actions, and therefore, the trial court could find rehabilitating defendant would not be feasible, since the doctor that examined defendant found him only marginally amenable to treatment due to minimizing the crimes. Since the trial court reasonably concluded defendant did not satisfy the third requirement, defendant could not have been granted probation, and thus would not have been exempt from the One Strike law—if the alleged exemption existed.

Defendant contends the trial court's findings for the third factor were unreasonable because defendant did admit some fault, in that defendant minimized the number of offenses, but did not completely deny the events. Dr. Kania's report reflects defendant admitted touching each victim once or twice, and that he claimed to do so "in an effort to demonstrate to them that no one should touch them 'there.'" Given that defendant was convicted of 30 counts of molestation, the trial court could reasonably conclude defendant's admission of touching the victims once or twice, in order to educate them about molestation, did not reflect an amenability to treatment or that

rehabilitation would be feasible, because defendant's admission was not substantial. Thus, we find defendant's argument to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RICHLI
Acting P. J.

KING
J.